Fluor Daniel, Inc. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 10–CA–24024

August 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On October 26, 1990, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the judge's decision and in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and, for the reasons set forth below, has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The facts, as more fully set forth by the judge, may be briefly summarized as follows. In early 1988, the Savannah Building Trades attempted unsuccessfully to persuade the Respondent to sign a prehire agreement at one of its construction projects (i.e., the Kemira project) and to organize the employees at both that site and at another (i.e., the Union Camp project). On December 20, 1988, between 100 and 150 members of various building trades appeared at a temporary employment office to apply for jobs at Union Camp. Of the 48 alleged discriminatees who were members of the Electrical Workers, Ironworkers, and Operating Engineers, none was hired to fill any of the 13 positions that were available to applicants without prior Fluor Daniel experience.[3] Every application revealed the applicant's union affiliation in one way or another.

The judge concluded, inter alia, that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to hire any of the 48 applicants named in the complaint. The Respondent excepts to this finding. We agree with the judge, but do so only for the following reasons.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),[4] the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.[5] The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.[6] That finding may be inferred from the record as a whole.[7]

Here, the Respondent clearly had knowledge that all 48 alleged discriminatees were union affiliated. As found by the judge, every one of the applications revealed some indicia of union membership, and all but two of the applications were filed on the morning of December 20, 1988, en masse, at the Respondent's employment office. None of the discriminatees was offered a position with the Respondent, called in for an interview, or even contacted by the Respondent after submitting an application. This occurred even though, as the judge found, each had at least a few years of experience and many listed credentials which should have at least warranted some type of inquiry by the Respondent.[8]

The applicants who were offered employment, on the other hand, uniformly displayed either weak or

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also correct the following inadvertent errors made by the judge: the name of the construction project at issue in this case is Union Camp, not Camp Springs; the date of the second meeting between representatives of the Building Trades and the Respondent was May 10, 1988, not December 20, 1988; it was Marshall Coleman who opposed signing the proposed prehire agreement, not Arnold Calhoun; and the application of Harry Freeman, an individual hired by the Respondent, shows his most recent employer to have been Fluor Daniel, Inc., not Tyger Construction. We find, therefore, that there were only 13 applicants hired who did not have prior Fluor Daniel experience. These errors do not affect our decision except to the extent that, in fashioning the remedy, it is clear that there were only 13 positions available for the 48 applicants, not 14, as found by the judge.

[2] The Respondent filed a motion to supplement the record. We grant the Respondent's motion but find that the evidence contained therein does not affect our decision.

[3] Charges were also filed on behalf of approximately 60 boilermakers and 3 millwrights. Their names were omitted from the complaint by the Regional Director on learning that the Respondent did not perform such work. Regarding the carpenter applicants, all carpenter positions were filled in accordance with the Respondent's preferential hiring system. The General Counsel did not challenge the legality of this system.

[4] Approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[5] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[6] *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co*., 285 NLRB 81, 82 (1987).

[7] *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

[8] We are not deciding which applicants were the most qualified nor whom the Respondent should have contacted. We find, however, in agreement with the judge, that the credentials listed by several of the discriminatees should have warranted at least some response from the Respondent.

nonexistent union ties. In fact, many had work histories with well-known nonunion employers. We find it reasonable to infer that it was not just coincidental that all those applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation.[9] We conclude that such a blatant disparity is sufficient to support a prima facie case of discrimination.[10]

We further agree with the judge's conclusion that the applicants were bona fide.[11] We find no evidence even remotely suggesting that the applicants in question were doing anything other than legitimately seeking work with the Respondent. In fact, the judge found, and we agree, that the discriminatees would have gone for interviews and very likely would have accepted employment with the Respondent, if such an offer had been made. Finally, we agree with the judge that writing in ''voluntary union organizer'' on many of the applications was no more indicative of union affiliation than other indicia of union membership mentioned on the discriminatees' applications. Accordingly, this factor is insufficient to alter our finding that the applicants were bona fide.[12]

Examining the Respondent's rebuttal case, we reject the somewhat conflicting defense it proffers for its actions: that the applicants were not bone fide which, the Respondent seems to contend, justified its refusal to consider any of the 48 applicants, and that its actions were not motivated by antiunion animus. Surely, the applicants' union affiliation must have played some role in the Respondent's determination that the applicants were not bona fide and its subsequent refusal to interview or hire any of the 48 discriminatees. Yet, the Respondent argues that the applicants' union affiliation played no role in its hiring decisions. In either case, the Respondent's argument fails.

Moreover, we also find that the evidence as a whole supports an inference that the Respondent discriminatorily and purposely failed either to consider the applications of, or offer employment to, any of the 48 discriminatees. The Respondent offered no credible reasons to explain why none of the 48 was considered in the same manner for employment as the other applicants.[13] We find persuasive the judge's comparisons and analysis of the resumes and credentials between applicants who were hired by the Respondent and those who were not, and her finding that factors other than merit caused the Respondent to discount the union applicants.

Thus, based on the totality of circumstances in this case, we agree with the judge that the Respondent's stated motives for rejecting the applications of the 48 discriminatees were false and that its true motive was to discriminate against them because of their union affiliation.[14] Accordingly, we conclude that the General Counsel made a prima facie showing of unlawful motivation on the part of the Respondent for its refusal to hire any of the 48 discriminatees as required under *Wright Line*. We reject the Respondent's proffered justifications as pretextual and find that the Respondent failed to meet its *Wright Line* burden of demonstrating it would have taken the same action absent the union activities of the 48 discriminatees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fluor Daniel, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

J. Howard Trimble, Esq., for the General Counsel.
Melvin Hutson, Esq., John P. Mann Jr., Esq. (Thompson, Mann & Hutson), of Greenville, South Carolina, for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Pursuant to a charge filed by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO on March 16, 1989, as amended on June 16 and August 8, 1989, a complaint issued on May 10, 1989, and was amended on December 22, 1989, alleging that the

[9] Based on our finding here, we find it unnecessary to rely on the judge's discussion of comments made by representatives of the Respondent at the May 10, 1988 meeting to infer animus on the part of the Respondent. We also find it unnecessary to rely on the judge's finding that the Respondent's conduct had a destructive impact on the future exercise of employee rights as contemplated in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[10] See *San Angelo Packing Co.*, 163 NLRB 842, 846 (1967) (the fact that 17 of 29 named prounion employees were selected for layoff whereas none of the remaining 37 employees were affected is not purely coincidental and is persuasive evidence of discrimination). See also *Lott's Electric Co.*, 293 NLRB 297 (1989); *Continental Radiator Corp.*, 283 NLRB 234, 248 (1987).

The Respondent introduced statistical evidence, through an expert witness, in an attempt to demonstrate that union membership did not adversely affect an applicant's chance of being hired. The judge found, and we agree, that the Respondent's witness based his opinion on a faulty premise and that his conclusions should be disregarded.

[11] We agree with the judge that *H. B. Zachry Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1989), is distinguishable. The court in *Zachry* found that the respondent did not violate the Act when it refused to hire someone who was already employed as a full-time, paid professional union organizer. In this case, however, there is no evidence that any of the applicants were employed by their unions as full-time organizers and were seeking simultaneous employment with the Respondent.

[12] We disavow reliance on the judge's discussion of *Sunland Construction Co.*, JD–214–89 (Sept. 5, 1989), because it is the Board's policy not to comment on pending cases.

[13] See *KRI Constructors*, 290 NLRB 802, 812 (1988).

[14] The judge found, and we agree, that the Respondent relied on pretextual reasons to explain its failure to contact any of the 48 discriminatees. In making this finding, the judge discredited the testimony of Doyle Gilliam that he sought to hire well-qualified applicants but found few applications of quality. This lends support to our finding that the Respondent's motive was unlawful. *Shattuck Denn Mining Corp.*, supra.

Respondent had refused to hire 48 named individuals on or about December 20, 1988, because of their membership in or activities on behalf of various trade unions, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] The Respondent filed a timely answer denying that it had committed any unfair labor practices.

A hearing was held in this case in Savannah, Georgia, on April 18, 19, and 20, 1990, at which time the parties had full opportunity to examine and cross-examine witnesses, introduce documentary evidence, and argue orally.[2] After considering the witnesses' demeanor, the parties' posttrial briefs, and on the entire record,[3] pursuant to Section 10(c) of the Act, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

The Respondent, a California corporation with an office and place of business located at the Union Camp Corporation jobsite in Savannah, Georgia, is and has been engaged as a contractor in the construction industry. During the past calendar year, a representative period at all times material, the Respondent purchased and received at its Union Camp jobsite goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The complaint alleges, Respondent admits, and I find that Fluor Daniel, Inc. is now, and was at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party Union is, and was at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

The Respondent, Fluor Daniel, is a major construction contractor with numerous projects both in and beyond the United States. Although the Respondent considers itself an open shop employer, and acknowledges that it intends to avoid union organization by all legal means, approximately 25 percent of its multibillion dollar business is performed by union labor. While almost all its union work comes about through subcontracts with firms operating under union agreements, a small portion is attributable to work performed pursuant to site-specific, prehire agreements.

This case had its roots in the Savannah Building Trades Council's efforts to interest the Respondent in signing a prehire project agreement in the spring of 1988 to cover a construction project at the Kemira Corporation in Savannah. When the Respondent refused to enter into such an agreement, the Building Trades Council started an informational campaign opposing Fluor Daniel's wage scale and practice of hiring workers outside the Savannah community. At the same time, the building trades attempted, without success, to organize employees both at the Kemira site and at another Fluor Daniel construction project at the Camp Springs Papermill in Savannah.

On December 20, between 100 to 150 employees belonging to the various building trades, appeared at the Respondent's employment center and submitted applications for jobs at the Camp Springs project. The complaint alleges that the Respondent unlawfully refused to hire 48 of these workers who belonged to three crafts—electricians, operating engineers, and ironworkers—because of their union affiliations.

The Respondent admitted that none of the applicants was hired, but defends its actions on two principal grounds: first, that they were not bona fide candidates for employment; rather, the union members applied for jobs at the Camp Springs project as part of the Building Trades Council's campaign to banish Fluor Daniel from the Savannah area; and second, the failure to hire any of the 48 applicants was not motivated by antiunion animus. For the reasons set forth below in the analysis section of this decision, I find that the Respondent's defenses are unpersuasive and that it unlawfully refused to hire any of the 48 discriminatees named in the complaint for discriminatory reasons.

B. *Background*

In the early spring of 1988, members of the Building Trades Council, an alliance of business agents representing diverse construction craft unions in the Savannah area, learned that Kemira, Inc. intended to award the contract for a major modernization project at its facility to the Respondent. In an effort to overcome serious unemployment problems, the then president of the Building Trades Council and business agent for Operating Engineers Local 474, Arnold Calhoun, requested Kemira's president to arrange a meeting with the Respondent to consider the possibility of entering into a prehire project agreement.

Through Kemira's good offices, respresentatives of the Building Trades Council and the Respondent met on two occasions. At the first one on March 24, Calhoun, spokesman for the Building Trades delegation, reviewed the terms of a prehire agreement for the Camp Springs project, which had been drafted with an eye toward making the Unions' terms as competitive and appealing as possible for an employer who was known to operate on an open-shop basis. Marshall Coleman, the Respondent's industrial relations director, made no commitments at this meeting other than promising to contact the Building Trades Council after reviewing the proposal.

Coleman testified that in deciding whether or not to accept such project agreements, the Respondent's practice was to perform an ''area labor market analysis'' which examined the following three factors: the number of unemployed Fluor Daniel employees in the area, costs, and client preferences. From such an analysis performed in the project area, a 75-mile radius of Savannah, Coleman learned that approximately 3500 Fluor Daniel employees were available, and that labor costs incident to a project agreement would be an estimated

[1] Unless otherwise indicated, all events took place in 1988.

[2] Exhibits offered by counsel for the General Counsel (the General Counsel) and by the Respondent will be referred to as General Counsel's exhibit and Respondent's exhibit respectively, followed by the exhibit number. The three volumes of the transcript will be cited as I, II, and III for each day of the hearing, followed by the page number (e.g., Tr. I–100).

[3] Following the hearing, the Respondent filed a motion to correct the transcript. As the motion is unopposed and accurately corrects some, if not all, the numerous errors in this record, the motion is granted. The Respondent's motion, which has been marked as G.C. Exh. 1(z), is admitted into evidence as part of the formal pleadings in this matter.

20 percent higher than if the work was self-performed.[4] Coleman also stated that although the project agreement was one of the best he had seen, accepting it would be ''bucking the trend.'' (Tr. II–80.)

Pursuant to Coleman's instructions, Emerson Johnson, the Respondent's industrial relations manager for the southeast region, telephoned Calhoun and informed him of Coleman's decision. Johnson also advised Calhoun that some subcontracting work would be let for which union union contractors could bid. Although Calhoun did not recall making any further statements, Johnson testified that the business agent ended their phone call with the following admonition: ''I'm sorry this happened. We'll see you in battle.'' (Tr. II–43.)

At Calhoun's request, Kemira's president interceded a second time and arranged another meeting on May 10. Calhoun, again serving as the Unions' spokesman, started off by asking what the building trades could do to make the project agreememt more palatable to the Respondent. Coleman responded that the project agreement appeared to be very competitive; was one of the best he had seen. Nevertheless, he stated that the Respondent would not sign the agreement, that it wanted to retain full control of the Camp Springs job, and would deal with the Unions only if they succeeded in winning an NLRB-1 sponsored representation election. At this, Alvah Watts, business agent and secretary/treasurer of Boilermakers Local 26, testified that he proposed bringing Labor Organizer Barry Edwards into the area. According to Watts, Johnson quickly rejoined that ''we don't want Barry Edwards in this area or any of the union organizers in here to mess up our jobs.'' (Tr. I–163.) Coleman then suggested that union craftsmen could apply at the gate and be considered for employment like any other applicant. Apparently unimpressed with this prospect, Calhoun replied that job referral was a union's responsibility, not Fluor Daniel's.

The parties differ considerably over the next important exchange between the principals. Calhoun testified at the trial that after the project agreement was rejected, he made one last effort to win the Respondent over, telling Coleman:

> we would be willing . . . we'll sign a contract for five dollars an hour. He said, ''I won't work your people for five dollars an hour. I can find better craftsmen off the street.'' [Tr. I–86.]

Other business agents who attended the May 10 meeting confirmed Calhoun's testimony with some modification. Thus, according to Boilermakers Business Manager Watts, the colloquy went as follows:

> He [Calhoun] said ''We put all this time and effort into a contract . . . but it doesn't look to me like you people will work our people for five dollars an hour.'' . . . and . . . Mr. Coleman said, ''That's correct.''
>
> And then . . . either Mr. Coleman or Mr. Johnson . . . made the statement that, ''We can get better qualified people off the streets through our hiring hall than you have at your hiring halls.'' [Tr. I–163.]

Edgar West, the Iron Workers business agent, put it this way:

> Arnie said, ''You mean to tell me we spent all this time putting this agreement together? . . . You didn't have any intention of hiring us to begin with. . . . You wouldn't hire us for five dollars a hour, would you?'' And he [Coleman] said ''No, I wouldn't.'' [Tr. I–224.]

The Respondent's witnesses recall this incident much differently. Paraphrasing the remarks of his labor counterpart, Coleman testified that Calhoun said:

> Sounds to me like there's nothing we can do to get an agreement with you people. You are telling me that even if our craftsmen were paid $5 an hour, you wouldn't work them. My response to him was ''. . . we're not interested in signing a project agreement on this job.'' [Tr. II–329.]

Emerson Johnson and James Head, the Respondent's vice president for operation, both denied that Coleman said anything about not hiring employees at $5 an hour. In fact, having taken no notes of the meeting, neither could recall anyone mentioning that figure. In addition, Johnson denied making any comment about Barry Edwards, although he admitted knowing who he was and discussing him with other contractors.[5] The parties agreed that shortly after this exchange, the meeting concluded rather abruptly.

In the months following its failure to obtain a prehire agreement, the Building Trades Council waged a campaign against the Respondent and another nonunion contractor which also was performing construction work in the area. As part of a larger organizing effort by the Building Trades unions, the campaign, titled ''Project Southern Fightback,'' included such tactics as handbilling at jobsites, billboard and newspaper advertising, and labor rallies. In general, labor's message was that because the Respondent paid substandard wages and hired workers from out of the State, ''Fluor Daniel Must Go.'' (See R. Exhs. 13–17.) In addition, the Unions attempted unsuccessfully to organize at the Kemira and Camp Springs projects by distributing authorization cards.

Events on December 20

In December, the Building Trades learned that the Respondent was hiring for the Camp Springs project at a temporary employment office located at the Westside Shopping Center in Savannah. As a rule, the Unions' bylaws proscribe accepting employment at nonunion sites and authorize the imposition of fines on members who do so. However, business agents for the three craft Unions involved in this dispute testified without controversion that these penalties were rarely, if ever imposed. Moreover, given the paucity of work in the area, in this situation, they had waived any proscriptions and encouraged their members to apply for work at the Respondent's Camp Springs project. In fact, the record shows that the Unions contacted a number of their members and urged them to appear at the Westside Shopping Center on December 20 to file applications.

[4] Coleman explained that this 20-percent figure included projections of costs attendant to jurisdictional problems which might arise among the different crafts.

[5] Barry Edwards, a paid, full-time union organizer, was a well-known figure in certain labor management circles in the construction trade. See *H. B. Zachry Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1989).

On December 20, between 100 to 150 members of the various building trade craft unions gathered at the shopping center between 8 and 11 a.m.[6] Apparently alarmed by the size of the crowd, the Respondent's personnel manager for the Union Camp project, Jim Lott, called the police who arrived on the scene, followed by television news crews.[7] Despite the number of people present, the crowd was orderly and no incidents were reported. The applicants formed a queue and entered the office 15 to 20 at a time where they left applications with the Respondent's agents which they either had completed in advance or on the scene. The name of each such applicant, his craft, and the date were entered into a log maintained by one of the Respondent's staff.[8] Forty-six of the forty-eight alleged discriminatees listed in the complaint, members of the Electricians, Iron Workers, and Operating Engineers unions, applied for work on that date, while two others applied on January 10, 1989.[9] Their applications were admitted into evidence as General Counsel's Exhibit 2, with the exception of those filed by Wayne Cross, which the Respondent was unable to locate.[10] None of the 48 was hired.

Each of the 47 applications revealed the applicant's union affiliation in more or less obvious ways. For example, well over half wrote that they were volunteer union organizers. In addition, many offered the names of their business agents as references; some identified their unions in a space reserved for professional associations; others indicated that they attended a union trade school or apprenticeship program while still others revealed their union affiliation by identifying previous employers known to be union contractors or listed wages that presumably reflected union scale. Many applications contained multiple indicia of the applicants' union affiliation.

The Respondent contends that these applicants had no real desire to work for Fluor Daniel; they were merely actors in an event staged by the Building Trades Council as part of its Fightback campaign. In support of this contention, the Respondent introduced the application of a Donald Edenfield which listed three references who either were fictitious or not living, as an apparent joke. (R. Exh. 3.)[11] However, Edenfield was not one of the named discriminatees.

To refute the Respondent's contention that the applicants were bogus, the General Counsel presented four witnesses who testified convincingly that they would have accepted employment gladly with the Respondent had it been offered. When applying for positions with Fluor Daniel on December 20, several of these men filed applications showing impressive credentials. Henry Blount, for one, submitted a printed resume with his application which set forth extensive training and experience. In addition, he listed the names of seven business references, four more than the Respondent required, and attached a copy of his electrician's license. Blount explained that he would have taken a position with the Respondent because his then-current employment required him to drive 4 hours to and from work each day. Although another applicant, George Crawford, was a skilled electrician who taught at the Union's apprenticeship training school, the only job he could find in the Savannah area was as a sign painter at a low rate of pay. He, too, testified persuasively that he genuinely was interested in a long-term position with the Respondent. Wayne Cross testified that he was working only part time and hoped to obtain full-time employment with the Respondent. Herbert Davis stated that he had been unemployed for 5 to 6 weeks prior to his seeking a job with Fluor Daniel.

Respondent's Hiring Practices

As a matter of policy, the Respondent considered applicants for employment for a 60-day period following the date of application. However, Doyle Gilliam, one of the Respondent's personnel administrators responsible for employment decisions at the Camp Springs project after January 1, 1989, testified that as a practical matter, he hired within a day or two after an application was filed. He claimed that although he reviewed applications filed during the previous 60 days, he found few of quality. He further explained that he customarily offered employment within a day or two after the application was filed because ''There is so much work going on'' qualified applicants quickly became unavailable.

Documents in evidence establish that during the 60-day period at issue here; that is from December 20 to March 20, 1989, the Respondent hired a total of 81 electricians, ironworkers, and operating engineers. Of that number, it is undisputed that the vast majority, 67, previously worked for Fluor Daniel and were rehired in accordance with the Respondent's policy of giving preference to former employees.[12] Specifically, 16 of 19 (84 percent) electricians, 26 of 27 (96 per-

[6] Estimates of the size of the crowd that appeared at the shopping center on December 20 varied. However, the majority of the witnesses who testified regarding the number who appeared there that day set the approximate number between 100 and 150. Only one witness set the size at 200. In addition, prior to the dismissal of charges filed by members of three crafts not involved in the proceeding, the original number of alleged discriminatees was 125. Accordingly, I conclude that the best estimate of those present at the shopping center on December 20 lies between 125 and 150.

[7] On cross-examination, union officials stoutly denied having summoned the media to the shopping center on December 20 and speculated that the TV crew which appeared at the shopping center may have followed the police there after picking up a police radio report of the incident.

[8] Blank applications were available at some of the union hiring halls.

[9] Charges also were filed on behalf of some 60 or more members of the Boilermakers Union, and 3 persons who had applied for millwright work. Their names were deleted from the complaint after the Regional Director learned that the Respondent did not perform such work. In addition, no complaint was issued regarding several carpenter applicants since the Regional Director found that the Respondent had filled all such positions in accordance with its lawful preferential hiring system. Thus, only the three crafts mentioned above are involved in this dispute.

G.C. Exhs. 2(14) and (43) are applications filed on January 10. Two applications, G.C. Exhs. 2(30) and (46) show file dates of December 19 and 21 respectively. Since the parties assume that 45 of the applications were submitted on December 20, I conclude that the applicants simply entered incorrect dates on their applications.

[10] Wayne Cross recalled having filled out an application on December 20 together with a large group of other union members gathered at the Westside Shopping Center. He also recalled that the application had ''volunteer union organizer'' written on it. Several months later, he filled out a second application given to him by his son who was working at the Kemira project. It is undisputed that Cross gave this second application to Emerson Johnson who promised to assist him in finding work at the Camp Springs project. However, Cross was not hired. I found Cross to be a credible witness whose testimony was corroborated in important respects by an official with the Respondent. Moreover, R. Exh. 20 proves that Cross' application was not the only one which the Respondent was unable to find. Consequently, I credit Cross and find that he did apply for a position with the Respondent on December 20.

[11] The three references were a Beetle Bailey, Charles Dickens, and John Doe. In fact, a document subsequently admitted into evidence indicated that Beatle Baily existed and could have been known by the applicant.

[12] The General Counsel does not challenge the Respondent's preferential hiring policy.

cent) ironworkers, and 25 of 35 (71 percent) operators hired, worked for Fluor Daniels sometime in the past.

Viewed from a different perspective, the Respondent hired only 14 of 81 craft employees without Fluor Daniel experience in the applicable 2-month period. The Respondent claims that the employment applications of these 14 reveal that 2 (10 percent) of the 3 electricians hired were affiliated with the Electricians Union, and 1 (4.76 percent) of 10 equipment operators was a union member. Neither of the two ironworkers hired without Fluor Daniel experience was affiliated with the Union. However, one applicant was employed who was both a union member and a Fluor Daniel alumnus.

Relying on the expert testimony of Dr. David West Peterson, a statistical consultant, the Respondent contends that its hiring decisions did not reflect an antiunion bias. After analyzing data supplied by the Respondent as to the applicant pool, and the characteristics of those hired during the relevant 60-day period, Dr. Peterson testified:

> If the employer had hired in each category in parity so that the hiring rate for the non-union people was exactly the same for the hiring rate for union people . . . the number of union people that would have been hired . . . would have been 5.89, and in fact four union people were hired. The difference between 5.89 . . . and . . . four . . . comes to .109 standard deviations which is far less significant than the two standard deviation threshhold that is often used with employment discrimination cases. [Tr. III–28–29.]

Summing up, Dr. Peterson concluded that although the .109 standard deviation reveals that the Respondent failed to hire according to perfect parity, this failure is not statistically significant.[13] He concluded, therefore, that holding union membership did not adversely affect the applicant's chance of being hired.

C. *Discussion and Legal Conclusions*

As alleged in the complaint, the General Counsel and Charging Party contend that the Respondent refused to hire 48 named individuals because of their membership in and activities on behalf of their unions in violation of Section 8(a)(3) of the Act.[14] Specifically, they argue that the Respondent purposely refused to consider anyone who filed applications on December 20 which demonstrated that they were union members. The Respondent denies that its failure to employ the 48 individuals named in the complaint was discriminatorily motivated; rather, it maintains that legitimate considerations drove its hiring decisions.

In cases such as this, where the legitimacy of the employer's motivation is in issue, the task of assessing the true reason for the Respondent's hiring decisions requires analysis in accordance with the burden shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There, the Board held that the General Counsel bears the initial burden of proving that the employees were engaged in protected concerted activity which was a dominant factor motivating the employer's actions. If the General Counsel succeeds in establishing a prima facie case, the burden shifts to the Respondent to prove affirmatively that its conduct would have been the same even in the absence of the employees' protected activity. Id. at 1089. *Wright Line*'s burden shifting test has been applied to various contexts, including cases alleging discrimination in the refusal to hire. See *Eskaton Sunrise*, supra.

The General Counsel's Prima Facie Case

1. Respondent's knowledge of the applicants' union affiliations

On applying these standards to the instant case, I am satisfied that the General Counsel has met his burden of establishing a prima facie case. At the outset, the General Counsel introduced into evidence the employment applications of all but one of the 46 union members who sought employment on December 20 and of the 2 who applied on January 10. Even a cursory review of these applications reveals that each applicant ''was or might be expected to be a union supporter.'' *Big E's Foodland*, 242 NLRB 963 (1979).

If Lott and Gilliam, the management officials directly involved in the hiring process for the Camp Springs project, reviewed these applications, as they said they did, they certainly noted that the greater majority of the applicants identified themselves as volunteer union organizers.[15] Where this element was absent, other indicia of union membership appeared on every application. Many applicants provided a work history with employers known to hire union labor, and/or cited former rates of pay which were recognizably higher than wages typically offered by nonunion employers. Lott and Gilliam admitted that they either were familiar with the union employers in the area or could recognize when a wage was one which was most likely offered by a union contractor. In addition, many of the December 20 applicants listed union business agents as personal references, gave the name of their union in the space seeking information about membership in job-related professional associations, and/or identified union training programs in which they had participated. Most applications contained multiple indicia, but none lacked at least one of these readily identifiable earmarks of union affiliation. Cf. *Tyger Construction Co.*, 296 NLRB 29 (1989) (nothing on majority of applications of alleged discriminatees revealed that the individual was a union member).

[13] Dr. Peterson explained that the words of art, standard deviation, refer to the difference between two percentages (i.e., between the percentage of employees hired with and without Fluor Daniel experience). If the difference between the two percentages exceeds two or three standard deviations, then statistical theory holds that the difference is statistically significant and cannot be attributed to chance. On the other hand, if the standard deviations are less than two, the converse is true; that is, the difference is insignificant, statistically speaking, and is the result of chance.

[14] Sec. 8(a)(3) proscribes discrimination by an employer against both applicants for hire and employees ''in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in an labor organization. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Lewis Mechanical Works*, 285 NLRB 514 (1987); *Eskaton Sunrise Community*, 279 NLRB 68, 77 (1986).

[15] As discussed above, I found Wayne Cross to be a credible witness, and therefore, concluded that he did file an employment application on December 20. Since he testified that someone had written on his application that he was a volunteer union organizer, it follows that he, too, would be considered a union member. Therefore, Cross shall be treated in the same manner as the 47 other individuals whose applications are collected in G.C. Exh. 2.

If the above signs of union membership were not enough, there is another factor which distinguished 46 of the named discriminatees: they all applied on the morning of December 20. Their appearance en masse at the Respondent's employment office was significant enough to impel the Respondent's hiring chief to summon the police who were followed by a television crew. This episode surely brought the December 20 applicants to the Respondent's attention in an unforgettable manner.[16]

2. Evidence of animus and motivation

The critical issue here, however, is not whether the Respondent knew that the 48 applicants were union members and had engaged in union activity. Those elements necessary to establishing a prima facie case are beyond dispute in the instant case. Rather, the more difficult problem is whether the Respondent's knowledge was causally related to its decision not to hire the 48. Because direct evidence of antiunion motivation is rare, proof of discriminatory intent may be inferred from circumstantial evidence in the record as a whole. See *Morgan Precision Parts v. NLRB*, 444 F.2d 1210 (5th Cir. 1971); *ACTIV Industries*, 277 NLRB 356, 373 (1985).

There are several factors which emerge from this record which give rise to the inference that the Respondent's refusal to hire any of the 48 applicants was discriminatorily motivated. I rely, in part, on certain comments made by highly placed management officials at the May 10 meeting with the Building Trades representatives.[17] After considering conflicting testimony about this meeting, I conclude that it was a frustrated Calhoun, not Coleman, who proposed an agreement with wages set at $5 an hour.[18] Clearly, the Respondent had no obligation to enter into a prehire agreement and I draw no inference of unlawful motivation from Coleman's refusal to do so. See *Tyger Construction Co*., supra at 30 fn. 1. It was not the fact that Coleman rejected the proposal, but the way in which he did so which is significant here.

Following Calhoun's remarks, Calhoun did not simply oppose signing the Building Trades' proposal for legitimate business reasons. Rather, he admitted rejecting the proposal even if the union members agreed to work at a wage scale lower than what the Respondent currently was paying. Calhoun may not have actually been willing to enter into an agreement with an hourly rate far below what the Respondent was offering to its nonunion work force. However, Coleman could have tested the genuineness of Calhoun's offer by accepting it. Alternatively, he could have regarded it as an opportunity to bargain for a highly desirable wage scale, one which might have saved the Respondent even more than the 20-percent higher costs attributed to union labor. Instead, Coleman dismissed Calhoun's statement out of hand, thereby indicating that he would not enter into a project agreement regardless of how advantagous it might be. Based on the parties' exchange and all the attending circumstances, I infer that Coleman's reaction stemmed not from legitimate business reasons but from a mindset which was opposed to hiring union employees under any circumstances. As Calhoun rightly observed, ''It wasn't the economical fact, it was something else.'' (Tr. I–149.) There is good reason to infer that the ''something else'' was the Respondent's antiunion animus.

Other comments errupted at the December 20 meeting which, taken altogether exposed the Respondent's antiunion bias. Both Calhoun and Watts testified that either Coleman or Johnson stated they could find more qualified workers off the street than through the Unions' hiring halls. Neither of the alleged speakers expressly repudiated this hostile remark. The Respondent submits in its brief that this comment evidenced nothing more than the Respondent's interest in controlling the employment process. I find this statement less benign than the Respondent suggests. Examined objectively, this remark goes beyond the Respondent's interest in retaining control of its employment decisions; it reflects a state of mind wholly adverse to employing union labor.

Further, at the trial, Coleman did not hesitate to assert that the Respondent firmly opposed union organization by all legal means. The Respondent's position in this regard clearly is not unlawful. See *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990). However, it sets an attitudinal backdrop for Johnson's abrasive comment that the Respondent did not want Barry Edwards, a professional organizer for the Boilermakers, or ''any of the Union Organizers in here to mess up our jobs.'' (Tr. I–163.)[19]

To be sure, Coleman told the Building Trades representatives that union members could apply for jobs and be considered like all other applicants. If taken at face value, Coleman's invitation arguably was inconsistent with the antiunion comments attributed to him and Johnson. However, contrary to Coleman's invitation, the evidence strongly suggests that the union craftsmen who applied to work for Fluor Daniel on December 20 were not accorded the same neutral consideration given to nonunion applicants. To the contrary, the evidence supports an inference that the Respondent purposely failed to consider their applications seriously.

Given the Company's preferential hiring policy, only 14 of 81 positions filled during the 2-month hiring period involved in this case, were available for applicants who lacked prior Fluor Daniel experience. The real issue here is why not 1 of the 48 applicants named in the complaint was interviewed or offered 1 of these 14 positions. Each applicant had at least a few years' experience, and many listed credentials which should have warranted some inquiry from an employer possessing a sincere interest in hiring qualified people.

Gilliam attempted to rationalize his failure to contact any of the 48 union members named in the complaint, but his excuses were incredible. As outlined above, Gilliam maintained that although he reviewed applications on file, he found few of quality. As an example of quality, Gilliam pointed to Jerry Lowe who submitted a handwritten resume with his applica-

[16] The applications of the two discriminatees who applied on January 10, 1989, also contain multiple indicia of union membership. See G.C. Exhs. 2(14) and (43).

[17] Evidence of events occurring prior to the 6-month statutory limitations period prescribed by Sec. 10(b) of the Act, is admissible to show antiunion motivation. See *Allis Chalmers Corp*., 231 NLRB 1207 fn. 14 (1977); *Darlington Mfg. Co*., 165 NLRB 1074, 1079 fn. 8 (1967).

[18] It could be assumed that Watts, secretary/treasurer of the Boilermakers, and a fellow member of the Building Trades Council, would support Calhoun's testimony in all important respects. Yet, West confirmed Coleman's testimony that it was Calhoun who said that the Respondent would not hire union men for $5 an hour.

[19] Johnson admitted knowing who Barry Edwards was but denied making the remark. No one at this meeting took notes. Therefore, in order to determine credibility in this situation, I rely on the inherent probability that Johnson, well aware of Edwards' reputation as a notorious union organizer, probably made the comments attributed to him.

tion form and listed five references. If Gilliam was impressed with Lowe's submission, he should have found Blount's professionally printed resume listing a greater number of references even more outstanding. Blount, an intelligent man who bore himself with much dignity, testified credibly that the person who accepted his application at the Respondent's employment office commented favorably on it. When he asked when he might expect a call, Blount was told they would contact him. He never heard from the Respondent again. Many other applications contained in General Counsel's Exhibit 2 demonstrated that the applicants were trained and experienced; yet, the Respondent did not contact, interview, or hire a single member of that group.

Even a cursory review of the credentials of some of the non-Fluor Daniels applicants whom Gilliam hired casts much doubt on his purported effort to find well qualified applicants and compels the inference that factors other than merit caused him to discount the union applicants.

Take, for example, the application of Michael Bruce. He applied for a carpenter's position on December 7 and cited experience solely as a carpenter or carpenter's helper. Notwithstanding Bruce's limited work history, Gilliam retrieved Bruce's application from the files, contacted him, and found that he had grown up on a farm. From this, Gilliam concluded that Bruce was capable of operating a light tractor and offered him a job on January 23. In doing so, Gilliam disregarded far more competent and experienced operators whose applications appear in General Counsel's Exhibit 2.

Nothing exceptional appears in Sammy Bullin's application which would mark him as a particularly qualified employee. He listed no special training and his experience was limited, except for the fact that he worked for Tyger Construction, a known nonunion contractor. Bullins applied on January 10 and Gilliam offered him a job the following day. Another applicant, William Pearson, unfortunately was illiterate and needed help with his application. In fact, his form is incomplete in many respects. It contained no educational or training credentials, listed few former employers, and gave no references. Nevertheless, Gilliam hired Pearson as an operator a week after he applied, explaining that he had been referred by a Fluor Daniel's equipment superintendent and that he had checked him out with other companies, one of which was a known nonunion contractor. (Tr. II–459.)

Gilliam's other justifications for failing to contact any of the electricians, ironworkers, or operators who applied on December 20 make no more sense than his claim that he was searching for qualified employees. Consider his testimony that he filled positions shortly after the application was filed because (1) there was a lot of work going on and (2) a competent person would not be available for long. Several union leaders testified without contradiction that the unemployment rate for their crafts hovered close to 70 percent. Given such conditions, it is unlikely that applicants would find jobs easily, particularly during the holiday season which fell within this 60-day period. Further, the Respondent's own exhibit contradicts Gilliam's assertion that it was necessary to hire applicants shortly after they applied. Respondent's Exhibit 20 shows that of 19 electrician positions filled, 5 individuals who had no apparent union affiliation were hired from 1 to 3 weeks after their application date. Similarly, 3 of 28 ironworkers and 14 of 35 operators were hired from 1 to 3 weeks after the date they applied.[20]

In still another attempt to counteract the inference that arises from his failure to interview or hire any of the craftsmen named in the complaint, Gilliam alleged that he hired a pipefitter who had the words ''volunteer union organizer'' inscribed on his application. The Respondent neither introduced an application for this supposed pipefitter whose name Gilliam could not recall, nor attempted to refresh Gilliam's recollection by showing him applicant logs for December 20. In fact, no evidence was introduced to establish when, if ever, this pipefitter applied. Having found Gilliam's testimony untrustworthy on almost every score, in the absence of any other substantiating proof, I decline to credit his assertion that he hired anyone who identified himself as a volunteer union organizer.

Only one common thread bound the Respondent's choice of employees—virtually all those hired in the relevant timeframe submitted applications which bore no indicia of union affiliation. Indeed, many contained affirmative evidence that the applicants worked almost exclusively for nonunion employers.

The Respondent disputes the charge that it was discriminatorily motivated in its hiring practices by claiming that of the 14 positions available for persons lacking Fluor Daniel experience, 4 were filled by individuals whose applications demonstrated union ties. The four applications on which the Respondent relies, those of Louis Graham, Earl Penniman, Harry Freeman, and Robert Hawkins, do not securely support for its claim.

Scott and Gilliam, the industrial relations officials responsible for hiring prior to and after January 1989, respectively, concluded that Graham had a union background based on previous employment and rate of pay with Babcock & Wilcox. Apart from this data, Graham's application is barren of anything that might mark him as a union member. Interestingly, Graham, who applied for a position solely as a welder, was listed as one of three electricians hired without Fluor Daniel experience. Gilliam explained that he employed Graham on January 16 because the Respondent needed a welder and ''We didn't have anyone available by then.'' (Tr. II–201.) If Gilliam had reviewed the applications on file in an unbiased fashion, he would have discovered at least four union welders whose credentials as good as if not better than Graham's. (See G.C. Exhs. 2(2), (8), (26), and (46).)

Scott also identified Penniman as union-oriented based on the fact that he participated in an IBEW apprentice training program. However, it is highly probable that Penniman, who was born in 1928, was involved in the IBEW program many years ago. His recent experience immediately prior to applying to the Respondent, was as a foreman with Brown & Root, another acknowledged open-shop employer. Given the recency of this employment, compared to the dated nature of his union contact, Penniman did not clearly label himself a union supporter.

Freeman is identified in Respondent's Exhibit 20 as possessing both a Fluor Daniel and union background. However, in the absence of any enlightening testimony, I am unable to detect any union connection from his application. To the

[20] Most of those employed were former Fluor Daniel employees and generally were offered jobs on the same date they applied.

contrary, Freeman listed Tyger Construction as his last employer.

Gilliam pointed to Hawkins' employment by a union contractor with pay at union scale as demonstrating his probable union affiliation. However, Gilliam failed to note that Hawkins also cited recent employment as an equipment superintendent with Tyger Construction. This latter experience creates doubt as to Hawkins' union sympathies.

If there is any characteristic which unifies the above four individuals, it is not the strength of their ties to a union. To the contrary, in each case, their purported union links are either remote, weak, or nonexistent. In contrast to the 48 named discriminatees, whose applications typically demonstrated multiple indicia of union affiliation, the Respondent could hardly believe that Graham, Penniman, Freeman, and Hawkins qualified as current representatives of organized union labor.

In its Exhibit 20, the Respondent summarized statistical data as to the total number of applicants in each craft, the number hired, and whether those hired had Fluor Daniel or union experience. Assuming that the figures provided to him were accurate, Dr. Peterson performed calculations which led him to conclude that prior employment with the Respondent significantly improved an applicant's employment opportunity. However, he also determined that union affiliation was not a statistically significant factor affecting an applicant's chance of being hired . The problem with Dr. Peterson's analysis lies not with his methodology, but with the premises on which he relied.

As shown above, the Respondent's assumption that Fluor Daniel hired four individuals with clearly established union affiliations is highly questionable. Removing even one or two of the persons from the union column and placing them in either of the other categories surely would alter Dr. Peterson's conclusion that union affiliation played no part in the selection process.

Further, in Respondent's Exhibit 20, asterisks were placed after the names of 18 individuals whose applications the Respondent was unable to find. Since the Respondent determined whether the applicant had union, nonunion, or Fluor Daniel experience from information on each application, no conclusions could be drawn about these 18. Dr. Peterson dealt with this problem by treating the 18 individuals as having neither Fluor Daniel nor union experience. What Dr. Peterson did not do was analyze the data assuming that all 18 or even a portion of them were union members. This could have had relevance since none of the 18 was hired. Dr. Peterson agreed that including the 18 as unhired union members would affect his calculations, but without performing a new analysis, was unwilling to say how this might alter his conclusion that no statistically significant deviation existed between the number of union and nonunion applicants hired. Given the flawed assumptions on which the doctor relied, I must disregard his opinion that union affiliation did not affect an applicant's employment opportunity with the Respondent.

In light of the foregoing discussion, little mystery remains as to the true motivation for Fluor Daniel's employment decisions. Based on all the evidence, it is fair to infer that the Respondent chose to ignore the 48 applicants named in the complaint because their applications and their concerted activity on December 20 unmistakeably stamped them as union supporters. Accordingly, I find that the General Counsel established a prima facie case. See *KRI Constructors,* 290 NLRB 802 (1988).

The Respondent Fails to Sustain Its Burden

1. The union members were bona fide applicants

Relying heavily on *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), the Respondent argues initially that the 48 individuals named in the complaint were not bona fide applicants. The Respondent's reliance on *Zachry* is misplaced. The facts as recited in the court of appeals opinion are as follows. Edwards, the alleged discriminatee in that case and a member of the Boilermakers Union, first was employed at one of the Zachry plants in 1980. Although satisfactory in his work, he later was discharged for what the Board found to be unlawful reasons. Zachry was ordered to reinstate him, but by the time the Board's order issued, the project for which he was hired was completed. Subsequently, Edwards applied for employment without success at other Zachry locations. At the time of his last application, Edwards was a full-time union organizer and intended to remain a union employee concurrently with his employment by Zachry. Had he been hired by the company, the union intended to compensate him for any salary differential and to continue his health, life, and pension benefits. Edwards had conceded that he sought entry to the plant to organize it. The Board ruled that Zachry had discriminated against Edwards by refusing to hire him because he was a union organizer and had initiated proceedings against the firm. 289 NLRB 838 (1988).

The court of appeals denied enforcement, finding that Edwards was not a bona fide applicant for employment and, therefore, was not covered under the Act. In reaching this conclusion, the court explained that although ''Edwards would undoubtedly share some of the external characteristics of a Zachry employee, at core he would remain an employee of the union.'' *Zachry v. NLRB*, supra at 73. In the court's view, the term employee ''does not contemplate someone working for two different employers at the same time and for the same working hours.'' Id. Since Edwards already had a job, he was not in search of one, like a true job applicant. The court also opined that in light of Edward's avowed role as a full-time union organizer, Zachry reasonably could assume that he would stay on the job only until the organizational campaign was over and not until the project was completed. Id. at 74. Additionally, the court observed that an employer is not required to permit a union organizer on its premises when other means to reach employees are available Id. While affirming that an employer may not discriminate against applicants on the basis of their union membership, the court also pointed out that an employer is not obliged to favor union membership in its hiring policies. Id. at 75. Summing up, the court emphasized the carefully circumscribed nature of its holding:

> We uphold the employer's right to reject a job applicant simultaneously paid and supervised by another employer. We do not encroach, however, upon the fundamental purpose of the NLRA to protect those with union sympathies and allegiances from unfair practices.

Of course, I am bound by Board rather than appellate court precedent. However, any conflict between the Board's and the court's rulings poses no problem here for the facts in the instant case are easily distinguished from those in *Zachry*. A critical difference lies in the fact that the December 20 applicants were not full-time paid union organizers; rather, with a few exceptions, they were unemployed electricians, ironworkers, and equipment operators.[21] As the unemployment statistics indicated, as virtually all the applications demonstrated, and as several of the witnesses testified, the December 20 applicants appeared at the Respondent's employment office on the advice and with the consent of their unions because they genuinely needed work. I cannot assume, as the court did in *Zachry*, that these applicants' primary purpose in seeking employment with the Respondent was to engage in organizational activity. Further, even if union members had filled each of the 14 available positions, they would have constituted only a minute part of the Fluor Daniel employee complement; hardly enough to disrupt operations as the Respondent supposed.

Further, unlike Edwards in the *Zachry* case, these applicants were not full-time organizers seeking simultaneous employment with the Respondent. Therefore, the Respondent would not have been burdened with paying them wages ordinarily paid by their unions, or would the unions have supplemented their pay. With unemployment uncontestably high in their crafts, with no alternative sources of income, and with roots in the Savannah area, these employees were not likely to quit their jobs before the project was completed. Thus, the Respondent could not assume that the union applicants would stay on the job ''only temporarily, i.e., for the length of the organizational campaign.'' *Zachry Co. v. NLRB*, supra at 74. In short, if the December 20 applicants had been hired, ''many of the normal incidents of the employer-employee relationship [would have] remain[ed] intact.'' Id. at 73.

It is true that many noted on their applications that they were volunteer union organizers, but these comments were no more revealing of their union affiliation than many other indicia of union membership and support which appeared on these forms.[22] In all probability, the union leaders suggested to the applicants that they add this comment as a way to test the Respondent's word that it was willing to hire union members.[23] In any event, efforts to conceal the applicants' union affiliations would have been pointless and disingenuous. By frankly announcing that they were volunteer union organizers, they avoided giving the Respondent grounds to accuse them subsequently of being union plants or infiltrators, rather than bona fide job applicants. Cf. *NLRB v. Elias Bros. Big Boy*, 327 F.2d 421 (6th Cir. 1964).

I have little doubt that the officers of the Building Trades Council had institutional objectives in mind when they encouraged members to apply for work with Fluor Daniel, and were well aware that a large applicant turnout on December 20 would have public relations value. At the same time, the unions, as a matter of survival, had to find employment for their out-of-work members. There is no inconsistency between the unions waging a campaign against Fluor Daniel and at the same time, urging their members to seek work with the Respondent, while it remained one of the largest contractors in the area.

Even if the union leadership had ulterior purposes in urging its members to assemble at the Respondent's employment center on December 20, this does not negate the fact that the applicants themselves were unemployed, experienced, and willing to accept work if offered, even under less-than-optimal terms and conditions of employment. Virtually all the union applicants stated in their applications that they were available immediately and that they either were open as to an acceptable rate of pay or would accept what the Respondent was offering. Many also noted they were willing to travel to work, while a lesser number even indicated a willingness to relocate. Such responses do not suggest, as the Respondent contends, that these applicants had hidden agendas and were not legitimately seeking employment. Many of the 48 union members noted on their applications that they were volunteer union organizers, thereby indicating they were prepared to engage in organizing activity after they were employed; but this does not alter the fact that they were bona fide applicants entitled to the protections of the Act. See *Sunland Construction Co.*, JD–214–89 (Sept. 5, 1989);[24] *Zachry Construction*, 289 NLRB 838.

In insisting that the December 20 union applicants were not seriously interested in jobs with Fluor Daniel, the Respondent asks rhetorically in its brief (1) why the applicants failed to inquire at the shopping center about job availability, (2) submitted incomplete applications, and (3) failed to reapply.[25]

Answers to these questions are readily available, but they do not support the inference the Respondent proposes. (1) First, the evidence suggests that the applicants may have asked more questions than the Respondent's industrial relations officer recalled. Given the press of applicants who ap-

[21] Lyman Cochran's application (G.C. Exh. 2(10)), shows that he may have a union employee on the date he applied. G.C. Exhs. 2(26), (32), (45), and (47) indicate that the applicant either still was employed or failed to give a termination date for his last period of employment. Blount also was working on December 20, but as he explained, he traveled to and from work for 4 hours and was seeking a job closer to home. I have no question about the legitimacy of Blount's intentions, and, without further evidence, am reluctant to include that the employees designated by exhibit number above, like the 43 other discriminatees, were not bona fide applicants.

[22] Interestingly, no applicant was asked what the duties or obligations of a volunteer union organizer might be.

[23] It also may be that the Building Trades Council was interested in probing the reach of the *Zachry* decision.

[24] In *Sunland*, supra, the administrative law judge ''reluctantly'' rejected the the employer's argument that the submission of a large number of employment applications from union members was part of the unions' hiring scheme ''designed to enmesh the Board . . . in a private labor dispute,'' because he knew of no precedent holding that a valid defense to otherwise discriminatory conduct could be based on a union's motives. (ALJD at 33–34.) The facts in *Sunland* offer insight into the judge's reluctance. There, only 3 months remained until the construction project was completed when four union members, one of whom was the Local's vice president, obtained employment. All four had secured waivers from the union allowing them to work for a nonunion company for the express purpose of organizing the job. Id. at 4. The other applicants for Sunland jobs, including those of full-time professional union organizers, were delivered in batches to the jobsite. In *Sunland*, no evidence was produced as to high levels of unemployment nor were the applications admitted into the record. Further, apparently, none of the spurned applicants testified as to their motives in applying for work with Sunland. The facts in the instant case are far more compelling than those in *Sunland* that the 48 discriminatees who sought jobs with Fluor Daniel were bona fide applicants. Here, the project was just beginning and the appplicants' right to work for a nonunion employer was not conditioned on their engaging in organizational activity. Moreover, testimonial evidence, together with the 47 applications, attest to the applicants' genuine interest in obtaining work during a period of high unemployment for them.

[25] Contrary to the Respondent's claim, I found no frivolous applications among those collected in G.C. Exh. 2.

peared at the employment center on December 20, the Respondent's small staff on duty there surely was preoccupied with distributing, receiving, and logging in applications, leaving little time to answer questions. Moreover, Blount credibly testified that he did question one of the Respondent's agents at the employment office. If Lott, who was directing the hectic employment process on that date, forgot that Blount questioned him, he may well have forgotten that others questioned him as well. (2) I find, as a matter of fact, that union members submitted or failed to submit duplicate applications in proportionately the same number as did nonunion applicants. Thus, the record shows that 1 of 96 union applicants and 4 of 241 nonunion applicants filed more than one application. These figures suggest that the failure to reapply was relatively uncommon among both categories and not necessarily related to union affiliation.[26] (3) I also find contrary to the Respondent's suggestion, that the applications submitted by union members overall were neither more nor less complete than those from nonunion applicants. Indeed, as discussed above, Gilliam hired one individual whose application was remarkable for its lack of information, indicating that the Respondent did not necessarily regard completeness as an important criterion.

In the final analysis, by failing a job to even one of the 48 union applicants, the Respondent never tested its contention that they had no real desire for employment. Thus, having no basis to conclude that these applicants were not genuinely seeking work in their trades, the Respondent's argument rests on surmise and conjecture. Its evidence is not enough to overcome the showing that the 48 discriminatees were bona fide applicants for hire entitled to coverage under the Act.

2. Statistical data tends to demonstrate antiunion discrimination

As discussed above, the Respondent adduced statistical evidence from its expert witness in an unsuccessful effort to establish that its hiring practices were nondiscriminatory. If the figures on which Dr. Peterson relied are evaluated in a more realistic manner, they appear to contradict his conclusion that union affiliation played no statistically significant role in the Respondent's hiring practices.

Since the odds were extremely high that prior Fluor Daniel employees would be rehired, including them in the applicant pool skews the results. Accordingly, it may be fairer to calculate the ratio between the number of applicants and those hired after subtracting the Fluor Daniel employees from the total applicant pool. When the applicant pool includes only union and nonunion applicants, far different results are obtained than those proposed by Dr. Peterson. Respondent's exhibit 22 shows that in the electricians craft, 37 percent of the non-Fluor Daniel applicants were union-oriented with an actual hire rate of less than 4 percent. Similarly, 30 percent of equipment operator applicants indicated union affiliation with a 1-percent employment rate. Even worse, close to 50 percent of the ironworker applicants were union-affiliated, but the hire rate was naught.[27]

In his text, *Use of Statistics in Equal Opportunity Litigation*, Sec. 4.05, 4–31–32, Dr. Petersen writes:[28]

> The composition of the applicant pool and the new hires should be similar if the company's hiring practices are non-discriminatory.
>
> If offers of employment are extended proportionately to affinity group members, it is evidence that the hiring process from applicant pool to new hires is non-discriminatory. If the offers . . . are consistently given relatively less frequently to affinity group members, it is strong evidence of discrimination.

Based on the foregoing computations, an enormous disparity exists between the union members' representation in the applicant pools and their rates of hire. Cf. *Tyger Construction*, supra (statistics demonstrated that union-oriented employees were hired in *greater* numbers than their representation in the applicant pools) (emphasis added). Since the Respondent has not presented persuasive evidence to account for these disparities, In keeping with Dr. Peterson's analysis, these statistical disparities support the inference that Fluor Daniel's hiring practices were biased against the union applicants.

Clearly, the Respondent treated all applicants who demonstrated strong union ties in a manner different from and inferior to applicants who were not union activists, and failed to show lawful justification for such treatment. In such circumstances, it is fair to infer, without further proof, that the Respondent's conduct was discriminatorily motivated and had a destructive impact on the future exercise of employee rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *National Fabricators*, 295 NLRB 1095 (1989), enfd. 903 F.2d 396 (5th Cir. 1990).

In sum, I conclude that the Respondent has failed to satisfy its burden under *Wright Line*; it has adduced no convincing evidence that it would not have employed the 48 discriminatees even in the absence of their union activity. Accordingly, it follows that the Respondent's failure to offer positions to those named in the complaint violates Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The 48 individuals named in paragraph 6 of the amended complaint were bona fide applicants for employment entitled to the protections of the Act.

4. By refusing to offer positions to any of the 48 named discriminatees because they were members or supporters of labor organizations, as demonstrated by their job applications and group appearance at Fluor Daniel's employment office, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[26] The union applicant who reapplied was Wayne Cross.

[27] According to R. Exh. 22, 20 of 54 non-Fluor Daniel applicants were identifiably affiliated with the Union and 2 were hired; of 81 equipment operator applicants, 21 were union members and 1 was hired. Fifty-three of 111, ironworker applicants were associated with the Union and none were hired.

[28] Coauthor W. Connolly Jr., New York Law Journal Seminars Press (1987).

THE REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the applicants named in paragraph 6 of the amended complaint, I shall recommend that the Company cease and desist therefrom and take appropriate action designed to effectuate the policies of the Act.

Generally, the remedy in refusal-to-hire cases is no different than the relief ordered for traditional violations of Section 8(a)(3); that is, a make-whole order for backpay and reinstatement. While recognizing that ''employment patterns in the construction industry have unique characteristics and jobs are frequently of short duration,'' the Board, nevertheless, stated in *Dean General Contractors*, 285 NLRB 573–574 (1987), that:

> these general characteristics, standing alone, do not justify a departure from our traditional make-whole remedy prior to compliance. We simply do not now know, as a factual matter, whether the Respondent would have transferred or reassigned (the discriminatee) elsewhere. Indeed, although jobs in the construction industry are frequently of short duration at a single project, that is not always the case. . . . Further, it is not unusual for employers to carry over or request selected employees from jobsite to jobsite. Determination of whether an employee may have been transferred or reassigned elsewhere is a factual question and, as such, is best resolved by a factual inquiry at compliance. [Footnotes omitted.]

Fashioning a remedy in this case is particularly problematic since, at best, only 14 positions were available for 48 applicants. Thus, there is no assurance that all those in the protected class will be guaranteed relief. Further, although record evidence indicated that employees were laid off at the end of each project, Fluor Daniel employees were given preferential treatment when applying for subsequent positions with the Respondent. Absent discrimination, some of the 48 discriminatees would have been employed at the Camp Springs project and, consequently, would have received favored treatment when they next applied for a position at another Fluor Daniel project. Thus, their rejection at the Camp Springs project had multiple, far-reaching consequences. Moreover, there is no evidence which might show whether on occasion, the Respondent transferred some favored employees from site to site. As the Board pointed out, ''it is not unusual for employers to carry over or request selected employees from jobsite to jobsite.'' Id. at 573.

Difficult questions remain as to an appropriate remedy in this case, but they are best reserved for the compliance stage of the proceeding. For the present, in keeping with the Board's approach in *Dean*, I shall recommend the traditional make-whole remedy, with the understanding that the Respondent may introduce evidence as to the likelihood that the discriminatees would have been transferred or reassigned to other sites after the Camp Springs project was completed. Specifically, I shall recommend that the Respondent offer immediate employment to the discriminatees who would have been hired but for the Respondent's discriminatory treatment of them, and if the construction project at Camp Springs is completed, the Respondent shall offer the named discriminatees the same or substantially equivalent employment at other projects as close as possible to Savannah, Georgia. I also shall recommend that the discriminatees named in the complaint be made whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them from the date they applied for employment to the date that the Respondent makes them a valid offer of employment. Backpay shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in conformance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Additionally, it shall be recommended that the Respondent expunge its files of any reference to the failure to employ the named discriminatees and inform them that this has been done.

It is important to bear in mind that all reinstatement and backpay recommendations are subject to resolution of the issues outlined in *Dean*, supra at 575. Thus, the Respondent may introduce evidence at a compliance hearing regarding the likelihood that those discriminatees who were hired, would have been transferred to other projects subsequent to the conclusion of work at the Camp Springs site. If the Respondent establishes at compliance that the discriminatees would not have been transferred, then the Respondent shall place their names on a preferential hiring list for jobs at other projects and offer them positions as they become available in their respective crafts, since they would have had preferred status as Fluor Daniel employees had the Respondent not discriminated against them. See *Apex Ventilating Co*., 186 NLRB 534 (1970). Evidence regarding transfer or reassignment also may be considered with regard to the date when the Respondent's backpay liability terminated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Fluor Daniel, Inc., Savannah, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions, because they previously worked for union employers, or because they indicate on their employment applications that they are voluntary union organizers; or in any other manner discriminating with respect to their wages, hours, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees or applicants for employment in the exercise of their Section 7 rights protected by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the applicants for employment listed in paragraph 6 of the amended complaint, employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files and expunge any and all reference to the unlawful refusal to hire the discriminatees named in the complaint and notify the discriminatees in writing that this has been done and that the refusal to hire will not be used againt them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the remedial portion of this Decision and Order.

(d) Post at all of its jobsites within a 75-mile radius of Savannah, Georgia, copies of the attached notice marked ''Appendix.''[30] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions, because they previously worked for union employers, or state on employment applications that they are volunteer union organizers; nor shall we discriminate against such applicants in any other manner with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees or applicants for employment in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL offer the applicants for employment listed in paragraph 6 of the amended complaint, employment in positions for which they applied, or if nonexistent, to substantially equivalent positions, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful refusal to hire the 48 applicants named in the complaint, and will notify them that this action has been taken and will not be used against them in the future.

FLUOR DANIEL, INC.